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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. [redacted] 77

HARRIET C. BINNEY, FREDERIC CUNNINGHAM, AND CONSTANCE C. PERTZOFF ET AL.,

Appellants,

vs.

HENRY F. LONG, COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS.

APPEAL FROM THE PROBATE COURT, COUNTY OF NORFOLK, COMMONWEALTH OF MASSACHUSETTS.

STATEMENT AS TO JURISDICTION.

R. AMMI CUTTER,
TALCOTT M. BAKER, JR.,
Counsel for Appellants.

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IN THE

PROBATE COURT FOR THE COUNTY OF NORFOLK

No. 28100

HARRIET C. BINNEY ET ALS.

vs.

HENRY F. LONG, COMMISSIONER OF CORPORATIONS AND TAXATION.

STATEMENT AS TO JURISDICTION UPON APPEAL.

To the Honorable the Judge of the Probate Court in and for the County of Norfolk:

The appellants in support of the jurisdiction of the Supreme Court of the United States to review the above-entitled cause on appeal submit the annexed statement as to jurisdiction upon appeal.

PALMER, DODGE, BARSTOW,
WILKINS & DAVIS,
R. AMMI CUTTER,
TALCOTT M. BANKS, JR.,
Solicitors for the Appellants.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 1059

HARRIET C. BINNEY ET ALS.

vs.

HENRY F. LONG, COMMISSIONER OF CORPORATIONS AND TAXATION.

STATEMENT AS TO JURISDICTION ON APPEAL.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The appellants in support of the jurisdiction of this Court to review the above-entitled cause on appeal respectfully represent as follows:

I.

Statutory Provision Sustaining Jurisdiction.

Section 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 937 (U. S. C., Title 28, § 344), is as follows:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the

Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

* * * * * * *

Pursuant to the Act of January 31, 1928 (45 Stat. 54; U. S. C., Title 28, § 861a), as amended by the Act of April 26, 1928 (45 Stat. 466; U. S. C., Title 28, § 861b), the present appeal is brought in lieu of a writ of error.

II.

Massachusetts Statute of Which the Validity is Involved.

The appellee assessed succession taxes, as set forth more fully below, upon property interests of the petitioners under color of Sections 1 and 2 of Chapter 65 of the General Laws of Massachusetts (Tercentenary Edition), found on pages 813-815 of that Edition, the material provisions of which are as follows:

"SECTION 1. All property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein, belonging to inhabitants of the commonwealth, and all real estate or any interest therein and all tangible personal property within the commonwealth belonging to persons who are not inhabitants of the commonwealth except such an interest in such real estate as is represented by a mortgage or by a transferable certificate of participation or share of an association, partnership or trust, which shall pass by will, or by laws regulating intestate succession, or by deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made in contemplation of the death of the grantor or donor or made or intended to take effect in possession

or enjoyment after his death, and any beneficial interest therein which shall arise or accrue by survivorship in any form of joint ownership in which the decedent joint owner contributed during his life any part of the property held in such joint ownership or of the purchase price thereof, to any person, absolutely or in trust, except to or for the use of charitable, educational or religious societies or institutions, the property of which is by the laws of the commonwealth exempt from taxation, or for or upon trust for any charitable purposes to be carried out within the commonwealth, or to or for the use of the commonwealth or any town therein for public purposes, shall be subject to a tax at the percentage rates fixed by the following table:

(Table of rates quoted only to extent here pertinent.)

Relationship of Beneficiary to Deceased.	Rate Per Centum of Tax on Value of Property or Interest.			
	On Value not over $10,000.	On Excess above $10,000, not over $25,000.	On Excess above $25,000, not over $50,000.	On Excess above $50,000, not over $250,000.
Class A.				
Husband, wife, father, mother; child, adopted child, adoptive parent, grandchild.....	1%	1%	2%	4%
Class B.				
Lineal ancestor, except father or mother; lineal descendant, except child or grandchild; lineal descendant of adopted child; lineal ancestor of adoptive parent; wife of widow of a son; husband of a daughter.....	1%	2%	4%	5%

Provided, however, that no property or interest therein, which shall pass or accrue to or for the use of a person in Class A, except a grandchild of the deceased, unless the value exceeds ten thousand dollars, and no other property or interest therein, unless its value exceeds one thousand dollars, shall be subject to the tax imposed by this chapter, and no tax shall be exacted upon any property or interest so passing or accruing which shall reduce the value of such property or interest below said amounts.

"All property and interests therein which shall pass from a decedent to the same beneficiary by any one or more of the methods hereinbefore specified and all beneficial interests which shall accrue in the manner hereinbefore provided to such beneficiary on account of the death of such decedent shall be united and treated as a single interest for the purpose of determining the tax hereunder.

"SECTION 2. Whenever any person shall exercise a power of appointment, derived from any disposition of property made prior to September first, nineteen hundred and seven, such appointment when made shall be deemed a disposition of property by the person exercising such power, taxable under section one, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by the donee by will; and whenever any person possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a disposition of property taxable under section one shall be deemed to take place to the extent of such omission or failure in the same manner as though the persons thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

III.

Dates of Decree and of Presentation of Application for Appeal.

The decree sought to be reviewed was entered on January 20, 1936, in the Probate Court for the County of Norfolk, pursuant to a rescript from the Supreme Judicial Court of Massachusetts. The opinion of the Supreme Judicial Court, in accordance with which the rescript was issued, is not yet officially reported but has been printed in Mass. Adv. Sh. (1936) 153 and in 199 N. E. 528. The application for appeal is to be presented this 17th April, 1936.

IV.

Nature of the Case and Jurisdiction Upon Appeal.

The appellants are the trustees and certain beneficiaries of three trusts and the heirs-at-law and next of kin of Hetty Sullivan Lawrence Cunningham (frequently hereinafter referred to as "the intestate") who died intestate on August 20, 1931. All three trusts involved in this appeal were created before the enactment of any Massachusetts statutes by which the interests of these appellants as beneficiaries of these trusts, or as heirs-at-law of the decedent, could have been subjected to a succession or inheritance tax.

The terms of the first trust, which was established by agreement *inter vivos*, are summarized as follows in the opinion of the Supreme Judicial Court (199 N. E. at 529) referred to above:

> "In 1862, Amos A. Lawrence, the father of the intestate, created a trust for her benefit, which was accumulated until 1877, and thereafter the income was paid to her during her life. At her death, the principal

and unpaid income were to be distributed to such persons as she might by will appoint and, in default of appointment, to her surviving children."

Upon the death of the intestate the trust fund was distributed in accordance with these terms to her four surviving children, petitioners herein. The share of each child was within the amount exempted from tax by the second paragraph of Section 1 of Chapter 65 of the General Laws (Ter. Ed.), so that no succession tax could be levied by the Commonwealth of Massachusetts upon any of the shares unless they were united with other interests for the purpose of taxation.

The terms of the second trust are summarized as follows in the opinion of the Supreme Judicial Court (199 N. E. at 529):

> "In 1877 the intestate created a trust. Its pertinent terms were these: she reserved to herself only a life estate of the net income but no power to revoke, alter or amend. From and after her death, for twenty years, the net income was payable by quarter-yearly payments in equal shares 'to and among such of' her children as 'may be living at the time of payment,' living issue of a deceased child to take by right of representation. At the expiration of the twenty years after the death of the intestate, the trustees were to make division of the principal of the trust equally among her children then living, the issue of any deceased to take by right of representation with the provision that, if at her death or at any time during the twenty years next thereafter no child or issue of the intestate should be living, the trustees should transfer the principal of the trust to the heirs at law of her father if he then were deceased; otherwise to her own heirs at law."

At the intestate's death the appellee valued the interests under this trust of her four children, appellants herein, for the purposes of assessing succession taxes. Each interest

as so valued was within the amount established as exempted from tax by Section 1 of Chapter 65 of the General Laws (Ter. Ed.) and consequently by the terms of the statute no succession tax could have been levied by Massachusetts upon any of these interests unless other interests were united with them for the purpose.

The terms of the third trust are thus described in the opinion of the Supreme Judicial Court (199 N. E. at 529):

> "Each of the four children of the intestate succeeded on her death to an interest in a trust established under the will of her mother, Sarah E. Lawrence, who died in 1891. Property was thereby left to pay the income to each of her six children, two of whom are now living, and to the issue *per stirpes* of any such child deceased, so long as any of the six children should live; and for twenty years after the death of the last survivor, the income was to be paid to the grandchildren and to their issue *per stirpes*. The will then provided that each child by will might 'appoint the shares in which' the income given to his or her children and issue 'shall be apportioned among such children and issue,' and might also appoint the proportions in which the principal given to such children and issue 'shall be divided among such children and issue'."

The intestate, Mrs. Cunningham, did not exercise the special testamentary power of appointment given her by the will of her mother, Mrs. Lawrence. At Mrs. Cunningham's death the appellee determined the value of the interests under this trust passing to each of Mrs. Cunningham's four children. By the graduated rates of taxation incorporated in Section 1 of Chapter 65 of the General Laws (Ter. Ed.), each of these four interests as valued by the appellee, if taxable at all, would not be taxed by the Commonwealth at a rate in excess of one per cent. By uniting each such interest with other interests received in possession and enjoyment by these four children at Mrs.

Cunningham's death, the rate of tax levied by the appellee was increased to four per cent.

When the intestate, Mrs. Cunningham, died her own property, amounting to $299,241.58, was divided among her four children as her sole heirs-at-law. This property was also taxed by the respondent, but the appellants do not contest this tax either as to validity or as to rate.

After the death of the intestate, Mrs. Cunningham, in 1931, the appellee, purporting to act under authority of Sections 1 and 2 of the General Laws (Ter. Ed.), assessed certain succession taxes upon the interests of Mrs. Cunningham's four children under each of the three trusts and also upon the shares of the four children in Mrs. Cunningham's net estate. For the purpose of determining the rate and amount of this tax with respect to each child, the appellee united the interest of such child under each of the three trusts with his interest in the estate of the intestate, Mrs. Cunningham, and taxed the aggregate amount received by each child from all these sources at the rate established by Section 1 of Chapter 65 of the General Laws (Ter. Ed.) as applicable to such amount if taxable as an aggregate under Sections 1 and 2. By this method of computation the appellee assessed a tax on the total value of all the interests of each child at the rate of four per cent.

Each of the appellants paid his proportionate share of all these taxes assessed by the appellee and they subsequently filed a petition for an abatement of such taxes in the Probate Court for the County of Norfolk, pursuant to the second paragraph of Section 27 of Chapter 65 of the General Laws (Ter. Ed.) which reads as follows:

> "An executor, administrator, trustee, grantee, donee, survivor or beneficiary aggrieved by any determination of the commissioner may, within one year after the payment of any such tax, apply by a petition

in equity to the probate court having jurisdiction of the estate of the decedent for the abatement of the tax or any part thereof, and if the court adjudges that the tax or any part thereof was wrongly exacted it shall order an abatement of such part thereof as was assessed without authority of law. Upon a final decision ordering an abatement of any part of such a tax, the treasurer shall pay the amount adjudged to have been illegally exacted, with interest, without any further appropriation therefor by the general court."

In their petition the appellants claimed each and all of these taxes excepting those assessed upon the net estate of the intestate, to be illegal and excessive, and the imposition of them to be in violation of the Constitution of the United States of America, in that they deprived the appellants of their property without due process of law and denied them the equal protection of the laws.

The Probate Court, without making any decision, reserved all questions of law presented by the pleadings and an agreed statement of facts for the determination of the Supreme Judicial Court, which is the highest court of the Commonwealth of Massachusetts. This procedure was in accordance with Sections 9 and 13 of Chapter 215 of the General Laws of Massachusetts (Ter. Ed.) the material parts of these sections being as follows:

"SECTION 9. A person aggrieved by an order, decree or denial of a probate court made after this chapter takes effect, may, within twenty days after the entry thereof, appeal from the same to the supreme judicial court, and the appeal shall be heard and determined by the full court, which shall have like powers and authority in respect thereto as upon an appeal in a suit in equity under the general equity jurisdiction."

* * * * * * *

"SECTION 13. A judge of the probate court by whom a case or matter is heard for final determination may reserve and report the evidence and all question of law therein for consideration of the full court, and thereupon like proceedings shall be had as upon appeal."

The case was fully argued before the Supreme Judicial Court in behalf of both the appellants and the appellee.

In particular the appellants asserted that uniting property received by each child of the intestate from three different sources, viz: from Amos A. Lawrence, under the trust established by him in 1862; from Sarah E. Lawrence, by the terms of her testamentary trust; and by intestacy from Hetty Sullivan Lawrence Cunningham, for the dual purpose of levying a succession tax upon property which would otherwise be exempt and of increasing the rate of succession tax upon other property, is a denial to these children of due process of law and is as to these children a deprivation of property without due process and a denial of the equal protection of the laws in violation of the Fourteenth Amendment.

(Cf. *Hoeper* v. *Tax Commission of Wisconsin*, 284 U. S. 206).

The appellants further asserted that it was a denial of the equal protection of the laws, and an arbitrary and unresonable discrimination, to subject them to succession taxes in respect to property to which they were entitled by the terms of instruments which became effective many years before the enactment of any direct succession tax in Massachusetts, and to so subject them to tax for the sole reason that the trusts, under which the taxed property was held, contained powers of appointment, never exercised, created before September 1, 1907. It is the contention of the appellants that in Massachusetts property passing in

default of the exercise of a power of appointment created subsequent to September 1, 1907, given to a person other than the settlor (in circumstances exactly similar to those of the creation of the trust by Amos A. Lawrence in 1862) would not be subject to succession tax.

The appellants also asserted that they were denied the equal protection of the laws in that the existence, in two of the trusts here involved, of powers of appointment created before September 1, 1907, was taken by the appellee as sufficient justification for uniting interests received from these trusts by the four beneficiaries with their interests in the estate of the donee of the power, to the end that a succession tax should be levied upon certain property which otherwise would have been specifically exempt and that the tax levied upon other property passing in default of the exercise of the powers of appointment should be increased; whereas, if the powers of appointment had been created after September 1, 1907, such uniting of the various interests for succession tax purposes would not have been permitted or required by the statute. The appellants contended that the date of creating the power bore no reasonable or necessary relation to the subject of the tax and made a distinction that was wholly arbitrary and without basis.

It was also urged by the appellants that to assume to tax the appellants' interests under the trust established by the intestate in 1877, by virtue of a statute enacted more than thirty years later, was a violation of the due process clause of the Fourteenth Amendment. The appellants contended that the settlor had parted finally with all her interest in the property, beyond her own life interest, many years before the enactment of the taxing statute; that she had no power to revoke, alter or amend the trust and so could do no act which would affect the disposition of the remainder interest; and that the remainder interest in fact passed to bene-

ficiaries, born before the enactment of the taxing statute, who could only be prevented from taking the interest by the happening of events entirely outside their own and the settlor's control. In view of the general language of the opinion (199 N. E. at 530) and the citation of *Coolidge* v. *Long*, 282 U. S. 582, 598, the Supreme Judicial Court also clearly included in its decision in the case at bar a decision that there was no impairment of the obligation of contract in violation of Article I, Section 10 of the Constitution of the United States. The appellants also contend that this conclusion was erroneous.

Finally it was contended by the appellants that it was a violation of the Fourteenth Amendment to the Constitution to tax the vesting in possession and enjoyment of remainder interests received under trusts established long prior to the enactment of the taxing statute merely because powers of appointment were given to the life beneficiary of the trusts when these powers were never exercised, in no way affected the disposal of the property, were not reserved to the donor and could not in fact be exercised to return to the donor the property originally placed in trust.

The Supreme Judicial Court sent down a rescript directing that the petition be dismissed. The rescript incorporated by reference the opinion of that court. That opinion ruled adversely to all of the appellants' contentions that Sections 1 and 2 of Chapter 65 of the General Laws (Ter. Ed.) were repugnant to the Constitution of the United States and sustained in all particulars the constitutional validity of Sections 1 and 2 as applied to the situation in the case at bar.

The Probate Court entered a final decree pursuant to the rescript dismissing the petition. Under the Massachusetts practice the decree so entered constitutes the final decision of the highest court of the State in which a decision could

be had, so that the appeal is taken directly from that decree. The procedure has been exactly the same as that in *Coolidge* v. *Long,* 282 U. S. 582, in which Section 1 of Chapter 65 of the General Laws was held unconstitutional as applied to a trust similar in essential respects to the trust established by the intestate in 1877 which is involved here.

The constitutionality of another aspect of the statute under consideration was considered in *Saltonstall* v. *Saltonstall,* 276 U. S. 260, and that case is also direct authority for the assumption of appellate jurisdiction. The particular aspects of this statute involved in this petition for abatement have not been ruled upon by the Supreme Court of the United States in any connection.

The appellants, therefore, submit that this Court has jurisdiction of their appeal by virtue of Section 237 (a) of the Judicial Code as amended by the Act of February 13, 1925.

R. AMMI CUTTER,
TALCOTT M. BANKS, JR.,
Counsel for Appellants.

17th April, 1936.